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### The Re-Emergence of Previously Slayed Metis Rights-Denial Dragons: The Dangers and Duplicity in Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta

Jason Madden

*Pape Salter Teillet LLP*

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### Abstract

In 2003, the Supreme Court of Canada (SCC) released its unanimous reasons for judgment in *R v Powley*. Powley was—and remains—the high court’s only consideration of Métis rights, as “[A]boriginal rights,” protected by section 35 of the Constitution Act, 1982. In addition to setting out the legal test for the establishment of Métis section 35 rights, Powley slayed a multitude of Métis rights denial dragons that had emerged over the generations, including two of the dragons most often relied on by governments: (1) that difficulties in identifying Métis rights-holders, and, (2) competing Métis representation claims made Crown inaction in relation to Métis rights justifiable. Instead of accepting these arguments, the SCC in Powley recognized a positive Crown duty to negotiate with the Métis. The author, who is a Métis lawyer that has been involved in much of the Métis rights litigation and negotiations that have occurred over the last seventeen years, argues that Powley and this duty have been effectively leveraged by rights-bearing Métis communities from Ontario westward to secure several significant negotiated agreements as well as keep most of the slayed Métis rights denial dragons at bay. This article goes on to review a disconcerting 2016 decision of the Alberta Court of Queen’s Bench on Métis consultation, which, if applied further, has the potential to re-invigorate these most duplicitous dragons. In *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*, while the trial judge recognized that Métis harvesting rights had been accommodated in the Fort Chipewyan area, the court accepted the Alberta government’s arguments that difficulty in identifying the “proper rights-holder” and the potential of competing Métis claims were justifications for Crown inaction and its position of consulting with no Métis whatsoever. The author argues that the court’s flawed reasoning in *Fort Chipewyan* turns Powley and the Crown’s positive duties owing to the Métis on their head as well as has the potential to see the two above-noted Métis rights denial dragons take flight again.

# The Re-Emergence of Previously Slayed Métis Rights-Denial Dragons: The Dangers and Duplicity in *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*

JASON MADDEN\*

In 2003, the Supreme Court of Canada (SCC) released its unanimous reasons for judgment in *R v Powley*. *Powley* was—and remains—the high court’s only consideration of Métis rights, as “[A]boriginal rights,” protected by section 35 of the *Constitution Act, 1982*. In addition to setting out the legal test for the establishment of Métis section 35 rights, *Powley* slayed a multitude of Métis rights denial dragons that had emerged over the generations, including two of the dragons most often relied on by governments: (1) that difficulties in identifying Métis rights-holders, and, (2) competing Métis representation claims made Crown inaction in relation to Métis rights justifiable. Instead of accepting these arguments, the SCC in *Powley* recognized a positive Crown duty to negotiate with the Métis. The author, who is a Métis lawyer that has been involved in much of the Métis rights litigation and negotiations that have occurred over the last seventeen years, argues that *Powley* and this duty have been effectively leveraged by rights-bearing Métis communities from Ontario westward to secure several significant negotiated agreements as well as keep most of the slayed Métis rights denial dragons at bay. This article goes on to review a disconcerting 2016 decision of the Alberta Court of Queen’s Bench on Métis consultation, which, if applied further, has the potential to re-invigorate these most duplicitous dragons. In *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*, while the trial judge recognized that Métis harvesting rights had been accommodated in the

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\* Co-Managing Partner, Pape Salter Teillet LLP. I am a citizen of the Métis Nation and a descendant of the ‘Halfbreeds of Rainy Lake and River’ who collectively adhered to Treaty #3 in 1875. I would like to thank Ajay Winterburn, Zachary Davis and John Wilson for their suggestions and assistance with this paper. The opinions expressed in this paper are my own and may not necessarily reflect those of my Métis clients.

Fort Chipewyan area, the court accepted the Alberta government’s arguments that difficulty in identifying the “proper rights-holder” and the potential of competing Métis claims were justifications for Crown inaction and its position of consulting with no Métis whatsoever. The author argues that the court’s flawed reasoning in *Fort Chipewyan* turns *Powley* and the Crown’s positive duties owing to the Métis on their head as well as has the potential to see the two above-noted Métis rights denial dragons take flight again.

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IN 2003, THE SUPREME COURT OF CANADA (SCC) released its unanimous reasons for judgment in *R v Powley*.<sup>1</sup> *Powley* is the first—and currently the only—SCC case dealing specifically with the recognition and affirmation of the “[A]boriginal rights” of the Métis protected by section 35 of the *Constitution Act, 1982*.<sup>2</sup> While other SCC cases round out the high court’s consideration of Métis-specific legal issues,<sup>3</sup> *Powley* remains as a foundational precedent within modern Métis

- 2003 SCC 43 [*Powley*]. Jean Teillet from our firm was counsel for the Powleys from trial to the SCC.
- Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- See e.g. *R v Blais*, 2003 SCC 44 [*Blais*] (dealing with whether the Métis are included in the term “Indians” in Manitoba’s *Natural Resources Transfer Agreement, 1930*); *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 [*Cunningham*] (addressing the application of the *Canadian Charter of Rights and Freedoms* to the membership requirements of the provincial legislation that created the Alberta Métis Settlements); *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 [*MMF*] (dealing with the application of the honour of the Crown to the land grant promises made to the Manitoba Métis through section 31 of the *Manitoba Act, 1870*); *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 [*Daniels*] (addressing the determination of whether the Métis are included as “Indians” within the meaning of section 91(24) of the *Constitution Act, 1867*).

law, which is now a well-established component of Canadian Aboriginal law.<sup>4</sup> Despite having several opportunities to revisit or elaborate on *Powley* over the last seventeen years, the SCC has repeatedly refused to do so.<sup>5</sup>

*Powley*'s enduring legacy is that it slayed many of the Métis rights denial dragons that had created a "legal lacuna" with respect to the Métis and their rights.<sup>6</sup> These dragons were repeatedly used by Crown actors as justifications for denial, inaction, and delays in recognizing or respecting Métis rights. Some of the most destructive of these dragons included the following refrains: the Métis were not here at "contact" and so the Métis do not have any section 35 rights; whatever rights the Métis have derive from their First Nation ancestors and can only be exercised at their discretion; Métis are merely mixed-ancestry individuals so they cannot hold collectively-held rights; section 35 was simply a political promise to the Métis and does not protect any substantive constitutional rights; dealing with the Métis is too complex and challenging, and so the Crown is entitled to do nothing until the courts recognize Métis rights.

In addition to slaying these dragons, *Powley* set out the legal test Métis communities from Ontario westward have repeatedly turned to—and successfully relied on—to advance their claims in the courts, leverage negotiation processes with the executive branches of governments, and secure Métis rights recognition or accommodation agreements. Some of these successes include: further judicial recognition of Métis harvesting rights in southern Manitoba (2008),<sup>7</sup> southeast Saskatchewan (2007),<sup>8</sup> northwest Saskatchewan (2005),<sup>9</sup> and central Alberta

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4. Throughout this article, I refer to "Aboriginal law" as the law developed by Canadian courts in relation to Indigenous peoples, including decisions related to section 35. Aboriginal law is different than "Indigenous law," which refers to the jurisdictions and laws of Indigenous peoples. Modern Métis law, as a component of Aboriginal law, is distinct from the laws, legal orders, and jurisdiction of the Métis as an Indigenous people.
  5. *R v Hirsekorn*, 2013 ABCA 242 [*Hirsekorn CA*], leave to appeal to the SCC dismissed; *Corneau v Procureure générale du Québec*, 2018 QCCA 1172, leave to appeal to the SCC dismissed [*Corneau*]; *Vautour v R*, 2017 NBCA 21, leave to appeal to the SCC dismissed [*Vautour*].
  6. *Cunningham*, *supra* note 3 at paras 7, 8, 70: "Although widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities, the law remained blind to the unique history of the Métis and their unique needs. ... Governments slowly awoke to this legal lacuna. ... The constitutional amendments of 1982 and, in their wake ... signal that the time has finally come for recognition of the Métis as a unique and distinct people."
  7. *R v Goodon*, 2008 MBPC 59 [*Goodon*].
  8. *R v Belhumeur*, 2007 SKPC 114 [*Belhumeur*].
  9. *R v Laviolette*, 2005 SKPC 70 [*Laviolette*].

(2010);<sup>10</sup> negotiated agreements on Métis harvesting rights in Ontario (2004 and 2018),<sup>11</sup> Manitoba (2012),<sup>12</sup> and Alberta (2019);<sup>13</sup> an interim reconciliation plan between the federal Crown (Canada) and the Manitoba Metis Federation (MMF) in 2018;<sup>14</sup> and, three self-government agreements signed between Canada and the Métis Nation of Ontario (MNO), the Métis Nation Saskatchewan (MNS), and Métis Nation of Alberta (MNA) in 2019.<sup>15</sup>

While there is undeniably much more work to be done and the agreements noted above are far from perfect, significant progress has been made based on leveraging the legal framework in *Powley*. Quite frankly, the agreements noted above would have been unimaginable prior to 2003. I say this and write this

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10. *R v Hirsekorn*, 2010 ABPC 385 [*Hirsekorn PC*]. While the defendant in *Hirsekorn PC* was ultimately unsuccessful in establishing a Métis hunting right in the Cypress Hills area of Alberta, the trial judge did recognize “[t]he evidence has shown that an historical Métis community existed in the region of what is present day Edmonton and district” (*ibid* at para 115). In addition, as further discussed in this article, the Alberta Court of Appeal, in *Hirsekorn CA*, recognized “the historical rights bearing communities of the plains Métis are best considered as regional in nature, as opposed to settlement-based,” which resolved one of the fundamental disputes between the Alberta government and the Métis in Alberta (*Hirsekorn CA*, *supra* note 5 at para 63).
  11. *Framework Agreement on Métis Harvesting between Métis Nation of Ontario and Her Majesty the Queen in Right of the Province of Ontario*, 30 April 2018, online (pdf): <[www.metisnation.org/media/654740/metis-harvesting-framework-agreement.pdf](http://www.metisnation.org/media/654740/metis-harvesting-framework-agreement.pdf)> [perma.cc/JV7U-9XBM].
  12. *Points of Agreement on Métis Harvesting in Manitoba between Manitoba Metis Federation and Her Majesty the Queen in Right of the Province of Manitoba*, 29 September 2012.
  13. *Métis Harvesting Agreement between the Métis Nation of Alberta and Her Majesty the Queen in Right of the Province of Alberta*, 12 March 2019, online (pdf): *Métis Nation of Ontario* <[albertametis.com/wp-content/uploads/2019/03/Harvesting-Agreement\\_SIGNED.pdf](http://albertametis.com/wp-content/uploads/2019/03/Harvesting-Agreement_SIGNED.pdf)> [perma.cc/PJ3T-6GNS] [MNA–Alberta Harvesting Agreement].
  14. See Crown-Indigenous Relations and Northern Affairs Canada, News Release, “Manitoba Metis Federation and Government of Canada announce joint action plan on Advancing Reconciliation” (22 September 2018), online: <[www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2018/09/manitoba-metis-federation-and-government-of-canada-announce-joint-action-plan-on-advancing-reconciliation.html](http://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2018/09/manitoba-metis-federation-and-government-of-canada-announce-joint-action-plan-on-advancing-reconciliation.html)> [perma.cc/7V6F-7WM3].
  15. See Crown-Indigenous Relations and Northern Affairs Canada, News Release, “Historic self-government agreements signed with the MNA, the MNO and the MNS” (27 June 2019), online: <[www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2019/06/historic-self-government-agreements-signed-with-the-metis-nation-of-alberta-the-metis-nation-of-ontario-and-the-metis-nation-saskatchewan.html](http://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2019/06/historic-self-government-agreements-signed-with-the-metis-nation-of-alberta-the-metis-nation-of-ontario-and-the-metis-nation-saskatchewan.html)> [perma.cc/7LB8-JAK8]. For an example of one of these Metis Government Recognition and Self-Government Agreements (MGRSAs), see *Métis Government Recognition and Self-Government Agreement between Métis Nation of Alberta and Canada*, 27 June 2019, online (pdf): <[albertametis.com/wp-content/uploads/2019/06/2019-06-27-MNA-MGRSA-FINAL-to-be-posted-on-website.pdf](http://albertametis.com/wp-content/uploads/2019/06/2019-06-27-MNA-MGRSA-FINAL-to-be-posted-on-website.pdf)> [perma.cc/9PFE-HHBM] [MGRSA].

article as one of the Métis lawyers involved in all the above-mentioned litigation and who participated in negotiations both prior to and following *Powley*.<sup>16</sup> I am not an academic or an outside commentator, but I am Métis and have been in the courtrooms, at the negotiation tables, and, in attendance at Métis assemblies, where these issues have been or are being addressed in real time.

As this article and others in this special issue detail, Canadian Aboriginal law, at this moment in time, is largely irreconcilable with Indigenous jurisdiction and laws. This is all too evident to Indigenous lawyers. In practicing Canadian Aboriginal law, we often have to rely on the legal fictions the courts have created or propose new ones that will be acceptable to Canadian judges in order to advance our peoples' rights, interests, and claims. These constructs are often imperfect, and rarely align with Indigenous peoples' own laws or how our people may choose to exercise their inherent jurisdiction and rights if free from the constructs and constraints of the Canadian legal system. Like many Indigenous lawyers who need to respond to their client's immediate needs and goals, I often do not have the luxury of sacrificing progress in the name of perfection when our own people are being charged and harassed for exercising their constitutionally-protected rights, when resource development projects threaten Indigenous lands, culture, and way of life or when leaders want to see tangible results for their people.

My contribution to this special issue focuses on the re-emergence of one of the most duplicitous Métis rights-denial dragons that was slayed by the SCC in *Powley*. In *Powley*, the SCC rejected the Ontario government's argument that it was justified in denying Métis harvesting rights because it was too difficult to identify Métis rights-holders or to deal with competing Métis representation claims. In slaying this dragon, the SCC held that "the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada" and directed governments to get on with negotiations to "more clearly define the contours of the Métis right to hunt."<sup>17</sup> The Métis harvesting agreements noted above, which include rights

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16. I acted as legal counsel in *Lavolette, Belhumeur, Goodon and Hirsekorn*. My co-counsel on these cases included Jean Teillet, Clem Chartier, and Michelle LeClair-Harding. I have also appeared for Métis clients in all of the Métis-specific cases heard by the SCC since 2003, was counsel for the MNO, MMF, and MNA in reaching their harvesting agreements, counsel for the MMF in reaching its interim reconciliation plan with Canada announced in 2018, and counsel for the MNO and MNA in their self-government negotiations with Canada.

17. *Powley*, *supra* note 1 at paras 49-50.

recognition and accommodation agreements,<sup>18</sup> demonstrate this was not an impossible task, if governments sit down and negotiate with Métis.

Unfortunately, this Métis rights-denial dragon has recently reemerged in Alberta, in a mutated form. This time the rights-denial is in the context of the provincial Crown refusing to consult with *any* Métis, even after it has recognized a historic and modern day Métis community in a given area for the purposes of a Métis harvesting right in a provincial policy. Even more troubling is that this dragon has now found some judicial support in *Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta*.<sup>19</sup> In *Fort Chipewyan*, Justice Goss of the Alberta Court of Queen's Bench acknowledged there was sufficient evidence that the Métis community in the Fort Chipewyan area had a *prima facie* rights claim that met the first branch of the SCC's test to trigger the Crown's duty to consult;<sup>20</sup> yet, Justice Goss accepted the Alberta government's (Alberta) argument that it had no positive duty to work with or negotiate with the Métis to identify who should be consulted because of uncertainty with respect to who represented the rights-holder and competing Métis representation claims. Sounds familiar, doesn't it?

In this article, I argue that Justice Goss's disregard of Alberta's reciprocal and positive obligations flowing from a *prima facie* Métis rights claim is at odds with *Powley*, the Crown's duty to negotiate, and the very purpose of the Crown's duty to consult as set out in *Haida Nation v British Columbia (Minister of Forests)*.<sup>21</sup> The upshot of *Fort Chipewyan* is that there is now a judicially acknowledged *prima facie* Métis harvesting right in the Fort Chipewyan area,<sup>22</sup> but absolutely no one needs to be consulted with respect to potential adverse impacts to that right by provincial Crown actions. Further, the court essentially relieves Alberta from all of its corollary obligations and duties owing to the Métis flowing from this *prima facie* right. Instead of recognizing Alberta is obligated to negotiate, or, at the very least to attempt to identify who should be consulted, Alberta is able to rely on its own inaction to not consult with any Métis whatsoever. This is the very

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18. In some of these negotiated harvesting agreements, governments have been willing to fully recognize the existence of the rights at issue. In others, governments accommodate credibly asserted Métis rights based on policy approaches or agreement on how the Crown will conduct itself. This is the difference between rights recognition versus rights accommodation agreements.

19. 2016 ABQB 713 [*Fort Chipewyan*]. In this article, I refer to Justice Goss in *Fort Chipewyan* as "the court."

20. *Ibid* at para 365; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]. Throughout this paper when I refer to the Crown duty to consult, it includes the corollary duty to accommodate.

21. *Ibid*.

22. *Fort Chipewyan*, *supra* note 19 at para 363.



definition of an Aboriginal right proving to be hollow due to a refusal to identify or recognize a rights-holder.

This article highlights the legal inconsistencies, flaws, and dangers in the *Fort Chipewyan* decision. In so doing, it contributes to this special issue's theme that the jurisprudence on identifying rights-holders can often result in Aboriginal rights being rendered meaningless. The article begins with an overview of some historical context and judicial determinations in *Powley*, including the Métis rights-denial dragons *Powley* slayed, the judicially-created "proper rights-holder" conundrums, and the how the Crown's duty to consult relates to these conundrums. The article then provides an overview of the *Fort Chipewyan* case and shows how the court resurrects the previously slayed dragon which allows Crown inaction to justify a complete denial of Métis rights. The article concludes by arguing, based on *Powley* and other recent SCC jurisprudence, that this Métis rights-denial dragon cannot be allowed to resurface.

## I. THE *POWLEY* CASE

### A. BACKGROUND AND CONTEXT FOR THE *POWLEY* CASE

While many Métis had hoped that express Métis inclusion in section 35(2) of the *Constitution Act, 1982* would lead to meaningful negotiations, agreements, settlements, and modern day treaties on Métis lands, rights, and self-government, those hopes were dashed after the constitutional conferences in the 1980s (mandated by section 37 of the *Constitution Act, 1982*) failed to define the rights in section 35, and after the Charlottetown Accord—which included the celebrated Métis Nation Accord—was defeated in a referendum in October 1992.<sup>23</sup>

After 1992, Canada, the provinces from Ontario westward, and the Northwest Territories (the public governments who were parties to the Métis Nation Accord), largely walked away from the multilateral process and commitments contained within the Accord. As a result of these actions and the lack of political will on the part of these governments to exercise their prerogative powers and negotiate on

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23. "Proposed Métis Nation Accord" in *Report of the Royal Commission on Aboriginal Peoples*, vol 4 (Canada Communication Group, 1996), Appendix 5D at 252-58 [RCAP *Métis Perspectives*].

Métis rights issues, Métis began to explore the use of harvesting rights “test cases” in order to give meaning to the promise of section 35.<sup>24</sup>

The first of these Métis harvesting rights test cases was *R v Morin & Daigneault* out of northwest Saskatchewan.<sup>25</sup> The defendants were successful at trial and the first level of appeal; however, the Saskatchewan government did not appeal the case further, and so it would not be the first Métis section 35 rights case to reach the SCC. Around this same period, *Powley*—a similarly framed Métis harvesting rights test case in the Upper Great Lakes region of Ontario—would not receive the same pass from the Ontario government. Although the Powleys were equally successful at trial and the first level of appeal, the denial of Métis rights in Ontario was well-entrenched in the politics of the day and the then-Premier of Ontario vowed to appeal the case all the way up to the SCC. This set the stage for *Powley* to become the first Métis section 35 harvesting rights test case to reach the SCC.

## B. THE POWLEY TEST AND THE SLAYED MÉTIS RIGHTS DENIAL DRAGONS

On 22 October 1993, Steve Powley and his son Roddy killed a bull moose just outside Sault Ste. Marie, Ontario. They tagged their catch with a Métis card and a note that read the moose was to provide meat for winter.<sup>26</sup> One week later, the Powleys were charged by provincial Conservation Officers for hunting moose without a licence and unlawful possession of moose contrary to Ontario’s *Game and Fish Act*.<sup>27</sup>

The MNO, which had recently formed as a Métis-specific government in the province of Ontario and was brought into the Métis National Council as a governing member, advanced and financially supported the *Powley* case as a Métis harvesting rights test case. Notably, during this same period, the Royal Commission on Aboriginal Peoples released its final report which concluded that it was “indisputable” that there were distinct Métis communities in Ontario and that “[t]he Métis community at Sault Ste. Marie, a hub of early fur-trade activity, has a particularly long and eventful history.”<sup>28</sup>

Over the next decade, three levels of Ontario courts, and, finally, the SCC, all concluded that the Powleys were exercising a collectively-held Métis right to

24. For a discussion on the litigation strategy developed, see Jason Madden, “Daniels v. Canada: Understanding the Inkblot from a Métis Nation Perspective” in Thomas Isaac, ed, *Key Developments in Aboriginal Law* (Thomson Reuters Canada, 2019) at 93 [Madden, “Daniels v. Canada”].

25. [1996] 3 CNLR 157 (Sask Prov Ct) [*Morin & Daigneault*].

26. *Powley*, *supra* note 1 at para 4.

27. RSO 1990, c G1 as repealed by *Fish and Wildlife Conservation Act*, SO 1997, c 41.

28. *RCAP Métis Perspectives*, *supra* note 23 at 241.

hunt for food, protected by section 35. The SCC ultimately concluded that the Sault Ste. Marie Métis community held an Aboriginal right to hunt for food that was protected by section 35 and that Ontario's blanket denial of Métis harvesting rights in the *Game and Fish Act* unjustifiably infringed the Métis rights to hunt exercised by the Powleys.<sup>29</sup>

Fundamental to the importance of *Powley* was the ten part test set out by the SCC for the establishment of Métis section 35 rights. This test “uphold[s] the basic elements of the *Van der Peet* test,” but “modif[ies] certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims.”<sup>30</sup> In effect, the “contact” date in the First Nation context was changed to “effective control” for the Métis.<sup>31</sup>

Since 2003, the *Powley* test, as it is now known, has been repeatedly relied upon by Métis communities outside of the Great Lakes region of Ontario to judicially establish or negotiate the recognition or accommodation of their Métis section 35 rights. As further discussed below, the *Powley* test has had to be stretched and adapted by courts in western Canada, Crown actors, and Métis governments alike, and yet, it has proven to be sufficiently responsive and durable to deal with the diversity amongst Métis communities from Ontario westward. Granted, groups claiming Métis rights on the East Coast, in Quebec, in parts of Ontario, and in British Columbia have failed to meet the requirements of the *Powley* test.<sup>32</sup> These results, however, are due to the inability to demonstrate any collective identity as Métis—historically and consistently—or a lack of a sustained Métis presence—on the land—in a given region before effective control, as opposed to an inherent defect with the *Powley* test itself.

In recognizing and affirming Métis rights, *Powley* slayed some of the Métis rights-denial dragons that were previously used to deny or diminish Métis rights. For example, the SCC in *Powley* refuted the following deeply flawed claims: section 35 provides an affirmational statement to the Métis, but protects no substantive, existing Métis rights;<sup>33</sup> the Métis are merely mixed-ancestry individuals and therefore do not possess collectively held Aboriginal rights, and thus any Métis claims could be addressed by dealing with them as a socio-economic disadvantage

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29. *Powley*, *supra* note 1 at para 55.

30. *Ibid* at para 14.

31. *Ibid* at para 37.

32. See *e.g.* *Vautour*, *supra* note 5; *Corneau*, *supra* note 5; *R v Babin*, 2013 NSSC 434; *R v Willison*, 2005 BCPC 131, rev'd 2006 BCSC 985; *R v Paquette*, 2012 ONCJ 606.

33. *Powley*, *supra* note 1 at paras 13, 17.

population or as individuals;<sup>34</sup> any rights the Métis have are derivative or in other words flow from their First Nation ancestors as opposed to inhering in the Métis as a distinct Aboriginal community or as a people;<sup>35</sup> in areas where historic treaties had been negotiated, Métis harvesting rights do not exist, have been “extinguished,” or are inferior to treaty rights;<sup>36</sup> and Métis do not have the same special relationship to the land that other Aboriginal peoples do.<sup>37</sup>

*Powley*’s clarity on these points has proven to be an effective and durable shield—and sword—to keep many of the Métis rights-denial dragons at bay. One of the most disingenuous Métis rights-denial excuses made by governments was that difficulty in identifying Métis rights-holders or representatives of Métis rights-holders justified denying the recognition and affirmation of Métis section 35 rights.<sup>38</sup> Essentially, governments attempted to rely on their historical denial of the existence of Métis rights, as well as their ongoing indifference and inaction in recognizing Métis governance structures, as reasons courts should not recognize and affirm Métis rights. This argument amounts to the refrain that dealing with Métis rights is too confusing and too difficult.

In slaying this dragon, the SCC held that “the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada” and that “[t]he development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority.”<sup>39</sup> This conclusion and direction from the SCC reinforced the Ontario Court of Appeal’s similar conclusion that “[t]he government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the [Métis] right is uncertain.”<sup>40</sup>

Notably, following *Powley*, Ontario accepted this direction and ultimately reached a harvesting agreement with the MNO in 2004 and an additional agreement in 2018 (with several disagreements along the way including

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34. *Ibid* at paras 10, 29.

35. *Ibid* at para 14.

36. *Ibid* at paras 46, 50.

37. *Ibid* at para 50.

38. Throughout the *Powley* litigation, the Ontario government argued that because there was no list of Métis maintained by the federal government, it was impossible for them to recognize any Métis rights-holders in Ontario. The province also argued that because there was no generally accepted definition of Métis and there were competing entities claiming to represent Ontario Métis, it was justified in recognizing no Métis rights-holders whatsoever.

39. *Powley*, *supra* note 1 at para 49.

40. *R v Powley* (2001), 196 DLR (4th) 221 (Ont CA) at para 166 [*Powley* (2001)].

additional litigation).<sup>41</sup> Other governments from Ontario westward have similarly engaged in negotiations with Métis and reached agreements recognizing or accommodating Métis rights.<sup>42</sup> These agreements demonstrate that negotiating with Métis regarding their section 35 rights is not an impossible task. As the SCC observed, it is not, in fact, too difficult once the Crown is no longer able to rely on the Métis rights-denial dragons to justify its inaction and refusals to negotiate.

The SCC's recognition in *Powley* of the Crown's positive obligation to negotiate with Métis when asserted, accommodated, or established rights are at stake was not an anomaly. In 2016, the SCC reaffirmed in *Daniels* the conclusion that *Powley*, along with other Aboriginal law decisions, "already recognize a context-specific duty to negotiate when Aboriginal rights are engaged."<sup>43</sup> This Crown duty, while having limited judicial consideration to date, arguably creates a positive obligation on the Crown to negotiate with Aboriginal communities who have credibly asserted, accommodated, or recognized rights claims.<sup>44</sup> As further support for this positive Crown duty, the SCC also cites *Haida* and *Tsilhqot'in Nation v British Columbia*;<sup>45</sup> however, the SCC provides no pinpoint citations in those cases for this proposition.<sup>46</sup> I would suggest this duty is encapsulated in the following paragraph from *Haida*:<sup>47</sup>

The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.

In *Tsilhqot'in*, the SCC reaffirmed this paragraph from *Haida*, holding that "the Crown ha[s] not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims."<sup>48</sup>

Unquestionably, the SCC's directions in *Powley*, *Haida*, and *Tsilhqot'in* impose *positive obligations* (i.e., a legal duty) on the Crown to engage, negotiate with, and arrive at accommodations or agreements with the Métis when credibly asserted, accommodated, or recognized section 35 rights are engaged. This,

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41. *R v Laurin*, 2007 ONCJ 265.

42. See text accompanying notes 12-15.

43. *Daniels*, *supra* note 3 at para 56.

44. For a discussion on the potential implications and use of the Crown's duty to negotiate, see Madden, "Daniels v. Canada," *supra* note 24 at 107-109.

45. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].

46. *Daniels*, *supra* note 3 at para 56.

47. *Haida*, *supra* note 20 at para 25.

48. *Tsilhqot'in*, *supra* note 45 at para 17.

however, first requires answering the question of who is the rights-holder in the Métis context?

### C. WHO IS THE RIGHTS-HOLDER? THE “PEOPLE” VERSUS “COMMUNITY” QUANDARY

Like other Indigenous peoples recognized in section 35(2), the Métis have also repeatedly run up against the courts refusing to undertake a “peoplehood” analysis in the interpretation of their section 35 rights. Despite section 35(1)’s recognition and affirmation of the rights of the “aboriginal *peoples* of Canada,” the courts—in particular in regulatory prosecution proceedings dealing with individuals asserting collectively-held aboriginal or treaty rights<sup>49</sup>—have limited their findings of facts and conclusions to making a determination about a smaller rights-bearing sub-group such as a community, Band, or First Nation.<sup>50</sup>

In *Powley*, the litigants specifically limited their harvesting right claim to the Métis community in and around Sault Ste. Marie, which led the SCC to conclude that “[i]t is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis ‘people,’ or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.”<sup>51</sup> Other Métis litigants in western Canada, however, have repeatedly advanced their cases based on a broader Métis community or the Métis Nation—as a distinct Aboriginal people—being the proper rights-holder. To date, all attempts seeking recognition of the larger people as the relevant Métis rights-holder have been unsuccessful.

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49. I would also suggest that, increasingly, the choice of the litigation forum where an Aboriginal rights claim is being advanced (*i.e.*, within a regulatory prosecution versus a civil claim) contributes to how robust a court’s consideration of a larger rights holder will be. In a regulatory prosecution, a court is ultimately answering the question of whether the defendant possesses an Aboriginal right in the specific location where they were charged. In resolving these sorts of prosecutions, I have found the reluctant of judges to engage in broader considerations of the rights-holder or the extent of the traditional territory of the rights-holder. For better or worse, in civil claims, judicial consideration of these issues is more engaged and extensive. See *e.g.* *Lax Kw’alaams Indian Band v Canada (AG)*, 2011 SCC 56 at para 11; *R v Marshall*, [1999] 3 SCR 456; *R v Bernard*, 2005 SCC 43 at paras 142–44.

50. See Larry Chartrand, “The Constitutional Determination of a Métis Rights-Bearing Community: Reorienting the *Powley* Test” in Karen Drake & Brenda L Gunn, *Renewing Relationships: Indigenous Peoples and Canada* (Wiyasiwewin Mikiwahp Native Law Centre, 2019) 169 at 171–74; Karen Drake, “Who Are the Métis? The Role of Free, Prior and Informed Consent in Identifying a Métis Rights-Holder” in Dwight Newman & Ibrionke Odumosu-Ayanu, eds, *Indigenous-Industry Agreements, Natural Resources, and the Law* (Routledge, 2020).

51. *Powley*, *supra* note 1 at para 12.

In *Hirsekorn*,<sup>52</sup> despite forty-two days of trial that included voluminous amounts of evidence about the mobile Métis buffalo hunters of the Plains and the network they built throughout the prairies as well as a notice of constitutional question that identified the Métis Nation as the rights-holder, the Alberta Court of Appeal “decline[d] to make a determination with respect to whether there was only one, prairie-wide Métis community during the relevant time period.”<sup>53</sup> In *Belhumeur*,<sup>54</sup> the Saskatchewan Provincial Court dealt with the litigant’s claim that the Métis Nation or a Métis community spanning the parklands/grasslands was the relevant historic and contemporary Métis community as follows:<sup>55</sup>

The Crown submits that the Supreme Court clearly contemplated that Metis rights are possessed by individual Metis communities which make up the Metis Nation or the Metis people, not the Nation or the people themselves. ... I agree with the position of the Crown. *Powley* makes it clear that rights are possessed by *individual* communities that may make up a nation.

This conclusion in *Belhumeur* clearly overstates what the SCC actually held in *Powley*. The SCC did not undertake a peoplehood analysis because it was not asked to and did not need to. Like the Mìgmaq and other First Nation people, the Métis have similarly faced an unwillingness from the courts to approach section 35 from a peoplehood perspective. While *Powley* slayed some Métis rights-denial dragons, it left this particular issue unaddressed. Thus, according to the current state of the law, section 35 rights—at least with respect to harvesting rights that have been judicially recognized—are held by Métis communities.

#### D. WHO IS THE RIGHTS-HOLDER? THE “COMMUNITY” CONUNDRUM

This then brings us to another conundrum created in the Métis jurisprudence: What is the geographic scope of a rights-bearing Métis community? The SCC in *Powley* provides a relatively simple and straightforward definition of Métis community: “A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.”<sup>56</sup> And yet, the last seventeen years of litigation and negotiations demonstrates that answering this question is anything but simple or straightforward.

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52. *Hirsekorn PC*, *supra* note 10.

53. *Hirsekorn CA*, *supra* note 5 at para 64.

54. *Belhumeur*, *supra* note 8.

55. *Ibid* at para 201, 203 [emphasis added].

56. *Powley*, *supra* note 1 at para 12.

Following *Powley*, many interpreted the case as recognizing only the Sault Ste. Marie Métis community as the rights-holder, meaning the community was the settlement of Sault Ste. Marie proper and the harvesting territory of this community was likely a small circle (maybe fifty to one hundred kilometres) surrounding Sault Ste. Marie. Most governments seized upon the term “site-specific” and adopted a narrow (and incorrect) understanding of the recognized Métis community in *Powley*.<sup>57</sup> In fact, because Steve and Roddy Powley were hunting just outside of Sault Ste. Marie, the scope and distance of the Sault Ste. Marie Métis community’s harvesting right received little consideration at trial or on appeal.

Based on this “site specific” interpretation, government officials from Ontario westward brought forward negotiation proposals to identify settlements “like the *Powley* community” by locating dots on a map and then suggested drawing circles around those dots (encompassing maybe fifty to one hundred kilometres) to delineate the harvesting areas for these communities. This *de minimus* approach to the recognition of Métis harvesting territories and section 35 rights was summarily rejected by the Métis, which ultimately led to other the Métis rights test cases in Manitoba, Saskatchewan, and Alberta. The decisions in these cases reveal that the initial interpretations of *Powley* by governments were incorrect.

While the rights-bearing collective in *Powley* may be conveniently described as the “Sault Ste. Marie Métis community,” the evidence at trial established a regional community that dispersed from Sault Ste. Marie proper following land speculation and unfulfilled land-related promises from Treaty Commissioner Robinson. This very issue was squarely before the trial judge and he rejected the Crown’s arguments that the geographic scope of the “community” should be narrowly defined:<sup>58</sup>

The Crown has gone to great pains to narrow the issues in this trial to Sault Ste Marie proper. I find that such a limited regional focus does not provide a reasonable frame of reference when considering the concept of a Métis community at Sault Ste Marie. ... The lifestyle of the Métis more closely resembled the Indians that occupied this area and it would seem more reasonable to find the existence of the Métis on the fringes of the geographical boundaries of Sault Ste Marie ... including

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57. *Ibid* at paras 12, 19. It must be emphasised that references to site-specificity in *Powley* refer to the nature of the right itself (*i.e.*, where it can be exercised), and not to the nature of the Métis community (*i.e.*, it is not the case that a Métis community must be a single Settlement). For an analysis of the Crown’s site-specific approach, see Chartrand, *supra* note 50 at 174-77.

58. *R v Powley* (2000), 47 OR (3d) 30 at para 28 (Sup Ct).



Batchewana, Goulais Bay, Garden River, Bruce Mines, Desbarates, Bar River, St. Joseph's Island, Sugar Island and into Northern Michigan.

Based on these findings of fact, the trial judge held that, at a minimum, the “rights-bearing Métis community” extended hundreds of kilometres to the east, north, and west of Sault Ste. Marie, spanning almost twenty thousand square kilometres on the Canadian side and going into northern Michigan. These findings were ultimately upheld by the SCC.<sup>59</sup>

The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal.

...

Dr. Lytwyn concluded from this census data that “[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters” (Lytwyn Report, at p. 32).

...

The trial judge's finding of a contemporary Métis community in and around Sault Ste. Marie is supported by the evidence and must be upheld.

*Lavolette* was the first case to apply the new *Powley* test.<sup>60</sup> The defendant, Mr. Lavolette lived in Meadow Lake, Saskatchewan. He had extensive ancestral connections to Métis throughout Saskatchewan. He was charged for fishing in Green Lake, which is approximately fifty kilometres northeast of Meadow Lake. The Crown's arguments in this case were threefold: (1) Métis communities are discrete physical settlements like villages and towns; (2) neither Meadow Lake nor Green Lake was a rights-bearing Métis community; and, (3) if either Green Lake or Meadow Lake was a rights-bearing Métis community, each was a distinct Métis community; therefore, since Mr. Lavolette lived in Meadow Lake and was fishing in Green Lake, he could not exercise a “Green Lake Métis community's” harvesting right.

The trial judge rejected all of the Crown's arguments and adopted an approach that there was a “regional” rights-bearing community throughout northwest Saskatchewan that included Meadow Lake, Green Lake, Île-à-la-Crosse and extended into Alberta (Lac La Biche)—an area spanning well over forty thousand

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59. *Powley*, *supra* note 1 at paras 21, 26, 28.

60. *Lavolette*, *supra* note 9.

square kilometres.<sup>61</sup> In addressing the issue of whether Green Lake was a distinct “Métis community” from other settlements where Métis lived in the region, Justice Kalenith wrote:<sup>62</sup>

Both experts gave evidence showing that the regional unity was a highly established network based on trade and family connections. While the importance of a particular settlement fluctuated at different times, certain settlements remain fixed. Mr. Thornton testified that “it’s very difficult to isolate Green Lake out of this and look at it as a separate little community. You’ve got to recognize this as part of a much larger network and a much larger sense of what is becoming a national identity” (of the Métis people).

Within the larger network, certain fixed settlements developed as trade and transportation hubs. Dr. Tough described these fixed settlements as “nodes as part of a network where you have the need for extensive sort of operations of resources, collecting resources”. (Transcript, pp. 1286–1287). The fixed settlements were connected by a transportation system of river routes, cart trails and portages. Constant movement between the fixed settlements allowed the Métis in the area to develop and maintain significant trade and kinship connections throughout the region and with the larger network of Métis people.

The trial judge not only recognized the Métis had developed a regional unity throughout northwest Saskatchewan, but alluded to the Métis developing a broader national identity—as an Aboriginal people—solidified through trade and various institutions which supported their mobility and interconnectivity (*e.g.*, the northern boat brigades, the Red River cart trails, and the buffalo hunts in the south) as well as through kinship connections all the way to the Red River.<sup>63</sup> In the end, however, the trial judge concluded that the Northwest Saskatchewan Métis community, which formed a large regional triangle anchored around Green Lake, Lac La Biche, and Île-à-la-Crosse—including Meadow Lake—was the rights-bearing Métis community.<sup>64</sup>

*Laviolette* is an example of a case where, although a large, regional Métis community was recognized, a new legal fiction was created in the process. The regional *Laviolette* triangle could have just as easily been expanded to inter-link locations further north such as Buffalo Narrows and La Loche. Moreover, Lac La Biche’s central location interconnects to Métis living and moving along the North Saskatchewan River system as well as the Athabasca River. These “communities”—even when recognized as being regional in nature—often prove

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61. *Ibid* at paras 23-24, 27-30.

62. *Ibid* at paras 25-26.

63. *Ibid* at paras 24, 34.

64. *Ibid* at paras 36-37.

to have arbitrary boundaries that fail to recognize how Métis populations overlap and are indivisible from each other because, very often, the same Métis families are living throughout these regions. It is also worth noting that the evidence in some of these cases demonstrate that many key Métis families in these regions do not ancestrally connect to the Red River Valley, but are rooted in these regions outside the Red River for generations, while intermarrying and arguably absorbing Métis from the Red River who may move into these regions at later dates.

In *Belhumeur*, the courts took a similar regional approach to the identification of the Métis community at issue. Mr. Don Belhumeur, a Métis living in Regina, was fishing in the Qu'Appelle Valley near Lebret, approximately 85 kilometers from Regina. It was the Crown's position that either Regina was not a Métis community or that Regina and Lebret were two distinct Métis communities. Similar to the *Lavolette* case, the trial judge relied on evidence that the Métis were a mobile people that were connected through extensive trade, institutions, and kinship connections:<sup>65</sup>

Dr. Ray testified that a regional Metis network with fixed settlements developed in the parkland and grassland areas, around the buffalo hunts and Red River cart trails.

...

These included Turtle Mountain, Moose Mountain, Cypress Hills, Qu'Appelle Valley, Dirt Hills, Wood Mountain and the Souris River.

...

Dr. Ray testified that the nature of the fur trade and the nature of the Metis economy involved a great deal of mobility. A key component of their economy was hunting, trapping, fishing, working for the trading companies. He stated that these are all spatially extensive activities. He stated that the Metis community's regional network included wintering sites, trading posts, areas close to cart trails and gathering places that allowed the historic parklands/grassland Metis community to develop a regional cohesion and maintain significant trade and kinship connections throughout the region.

While, as noted above, the trial judge in *Belhumeur* rejected that the rights-holder was the Métis Nation or a rights-bearing Métis community that spanned the grasslands and parkland areas of the prairies, she ultimately found that there was a regional rights-bearing Métis community, which included the "Qu'Appelle Valley and environs" and extended to Regina.<sup>66</sup> This "community" spanned roughly thirty-five thousand square kilometres.

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65. *Belhumeur*, *supra* note 8 at paras 156, 158, 161.

66. *Ibid* at para 167.

In *Goodon*, the Provincial Court of Manitoba also adopted a regional approach to the identification of the rights-bearing Métis community at issue, including distinguishing it from the community recognized in *Powley*.<sup>67</sup> The trial judge rejected the provincial Crown's position that the rights-bearing Métis community at issue in that case was limited to a fifty kilometre radius around Turtle Mountain and instead held:<sup>68</sup>

The Metis community of Western Canada has its own distinctive identity. As the Metis of this region were a creature of the fur trade and as they were compelled to be mobile in order to maintain their collective livelihood, the Metis "community" was more extensive than, for instance, the Metis community described at Sault Ste. Marie in *Powley*. The Metis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States.

...

This area was one community as the same people and their families used this entire territory as their homes, living off the land, and only periodically settling at a distinct location when it met their purposes.

Rather than accept that a potential break in Métis living at or using Turtle Mountain for a period of time resulted in there being no rights-bearing Métis community there, the trial judge identified the larger region spanning most of southern Manitoba and extending into Saskatchewan and the United States as the geographic scope of the rights-bearing Métis community.<sup>69</sup> He further held that "[a] local Métis community could be present at more than one settlement in a particular region"<sup>70</sup> and recognized the community in *Goodon* spanned well over forty-five thousand square kilometres and included over ten thousand people.

While the defendant in *Hirsehorn* was ultimately not successful in establishing he had a Métis harvesting right in the Cypress Hills region near Medicine Hat, the Alberta courts in this case rejected the provincial Crown's argument that Métis communities must be understood as settlement-based:<sup>71</sup>

What is not clear on the evidence of this case, however, is whether there was essentially one regional Métis community across the prairies at this point in history (characterized by the appellant as the Métis of the Northwest), or more than one community encompassing slightly smaller regions. For instance, the reports of the

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67. *Goodon*, *supra* note 7.

68. *Ibid* at para 46-47.

69. *Ibid* at paras 33, 36-37.

70. *Ibid* at para 34.

71. *Hirsehorn CA*, *supra* note 5 at para 63 [emphasis added].

experts in this case speak of groups of Métis termed the “Red River Métis”, the “North Saskatchewan Métis” and the “American Métis”, although their evidence at trial shows some reluctance to classify these groups as different peoples. *I conclude that the historical rights bearing communities of the plains Métis are best considered as regional in nature, as opposed to settlement-based.*

In addition, in considering whether Métis from Fort Edmonton—who participated in the buffalo hunts on the Plains—had harvesting rights that extended down to the Cypress Hills, the trial judge concluded as follows:<sup>72</sup>

The evidence has shown that an historical Métis community existed in the region of what is present day Edmonton and district. This group of North Saskatchewan Métis included the settlements of Fort Edmonton, St. Albert, Lac St. Anne, Victoria, Lac La Biche, and Rocky Mountain House. The Métis people in this region had a distinctive collective identity, lived together in the same geographical area and shared a common way of life.

So, what do these cases tell us about identifying the rights-holder in the Métis context? After over a decade of Métis rights litigation across the prairies, courts have repeatedly rejected a site-specific or settlement approach to the identification of Métis communities. They have also rejected province-wide, prairie-wide, or nation-based Métis harvesting rights claims. In true middle of the road Canadian fashion, most courts have found a compromise by repeatedly recognizing Métis communities as “regional” in nature and scope, often spanning tens of thousands of square kilometres and crossing provincial and international boundaries (although their respective jurisdictions limit the enforceable effect of those determinations).

While these recognized regional Métis communities are better than a settlement-by-settlement approach to Métis rights recognition, they are essentially just new legal fictions created by the courts, and sometimes proposed by the Métis themselves as calculated decisions to secure legal victories. The regional approach fails to recognize the full historic and contemporary mobility, kinship, and interdependency of the Métis as a people and as interlinked and overlapping communities. For the better, the “site-specific” and “settlement-based” dragons have arguably been slayed. However, the regional approach creates challenges in dealing with Métis mobility between the regional communities, and for regional communities that overlap so much that any line becomes arbitrary and problematic.

With that said, the litigation expanding on *Powley* has, over almost two decades now, gradually assisted in moving governments away from a “dot

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72. *Hirsekorn PC*, *supra* note 10 at para 115.

and circle” approach to the identification of Métis communities. As the three negotiated Métis harvesting agreements that are now in place in Ontario, Manitoba, and Alberta demonstrate, this regionality has been further expanded to include hundreds of thousands of square kilometers of territory where Métis are able to harvest without fear of harassment or charges. Although many Métis believe this regional patchwork is still too limiting and arbitrary, and undermines Métis nationhood, it is a vast improvement over the government positions taken in 2003 when the Métis rights-denying dragons still ruled the day.

#### E. WHO NEEDS TO BE CONSULTED? THE “COMMUNITY” CONUNDRUM CONTINUED

The SCC case law is clear: The Crown’s “duty to consult exists to protect the collective rights of Aboriginal peoples.”<sup>73</sup> As such, “[the duty] is owed to the Aboriginal group that holds the s. 35 rights.”<sup>74</sup> Based on the existing Métis case law, this likely means that the duty is owed to regional rights-bearing Métis communities, not an individual, a family, a single settlement, or a localized area that may be a part of a larger regional Métis community. Since Métis have not yet achieved modern day treaties that clearly define the “rights-holder” for all purposes, the case law determines the likely “rights-holder” and who needs to be consulted in the Métis context.

Simply put, it would be a fallacy to assume that in the Métis context, the proper rights-holder for Crown consultation is a single settlement or localized governance structure that does not track to the understanding of a rights-bearing Métis community pursuant to the *Powley* test. The Crown’s duties to section 35 rights-holders must align with the collective that holds those rights. The assumption that Crown consultation could simply occur at a localized level, by looking for something equivalent to an *Indian Act*<sup>75</sup> band (or dot-on-a-map settlement) in the Métis context makes no sense if the rights-holder is a larger regional Métis community. Moreover, as the case law referred to in the other articles in this special edition demonstrates, the assumption that *Indian Act* bands are always the proper rights-holder in a First Nation context is also questionable where historic or modern treaties identifying the rights-holders do not exist.

These challenges can often be overcome through negotiated agreements between Métis and the Crown that clarify the community to be consulted. For example, many of the Métis governments discussed further below have through

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73. *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 30 [*Behn*].

74. *Ibid.*

75. RSC 1985, c I-5.

their bylaws, oaths, or other means, obtained and set out express authorizations from all their members to advance their collectively held rights, regardless of what components thereof may ultimately be determined to be the proper rights-holder. This is one reason in favour of Crown consultation with these longstanding Métis governance structures.

In addition, these Métis governments typically structure themselves to deal with Crown consultation based on the authorizations they have and through various parts of their governance structures working together. For example, the MMF has passed Resolution #8 which identifies its head office as the initial and central point of contact for Crown consultation with the Manitoba Métis community.<sup>76</sup> The MNO and MNA have each put into place Regional Consultation Protocols which set out how their local, regional, and provincial governance structures will work together on Crown consultation.<sup>77</sup> While these Métis governance structures and consultation protocols are respected and used to varying degrees by the Crown, industry, and others, they undoubtedly work to facilitate and support “[t]he development of a more systematic method of identifying Métis rights-holders” noted as being a priority by the SCC in *Powley*.<sup>78</sup>

## II. THE *FORT CHIPEWYAN* CASE

### A. BACKGROUND AND CONTEXT FOR THE *FORT CHIPEWYAN* CASE

#### 1. UNDERSTANDING CONTEMPORARY MÉTIS GOVERNANCE STRUCTURES

In order to put the *Fort Chipewyan* case into context, a general understanding of contemporary Métis governance structures from Ontario westward is required.<sup>79</sup> These Métis governance structures have developed, advanced, and supported the Métis rights cases discussed above, which have fundamentally shaped modern Métis law. They are also the entities who have, for the most part, represented the

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76. “Understanding Resolution 8” at 15, online (pdf): *Manitoba Métis Federation* <[www.mmf.mb.ca/docs/2013-Resolution%208%20Booklet-VFinal.pdf](http://www.mmf.mb.ca/docs/2013-Resolution%208%20Booklet-VFinal.pdf)> [perma.cc/78EG-QDSC].

77. See e.g. the “Metis Nation of Ontario Regional Consultation Protocols” (1 May 2020) online: *MNO Reference Documents* <[www.metisnation.org/governance/reference-documents](http://www.metisnation.org/governance/reference-documents)> [perma.cc/M63H-6CKH]. For a discussion of the MNO’s protocols regarding consultation, see Drake, *supra* note 50 at 13-18.

78. *Powley*, *supra* note 1 at para 49.

79. For a more detailed discussion on contemporary Métis governance structures see Jason Madden, “The Métis Nation’s Self-Government Agenda: Issues and Options for the Future” in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Irwin Law, 2008); Kelly Saunders & Janique Dubois, *Métis Politics and Governance in Canada* (UBC Press, 2019).

Métis in constitutional processes, in negotiations implementing *Powley* and other Métis rights cases, in Crown consultation, and in the delivery of programs and services to Métis citizens and communities in their respective provinces. Some of these governance structures, such as the MNA, are almost as old as the province they are situated in.

For the purposes of this article, I refer to Métis governance structures such as the MNA, MNS, MME, and MNO as “Métis governments.” While admittedly their legal and administrative arms are currently established under provincial legislation as “associations,” “secretariats,” or “corporations,”<sup>80</sup> the legitimacy of these Métis governments comes from the mandates they receive from their members (*i.e.*, citizens), their objectively verifiable registries which identify legitimate Métis rights-holders, their democratic elections, and their longstanding recognition as the legitimate representatives of their respective constituencies. While Canadian law may not yet formally recognize them as Indigenous public governments, they are unquestionably Indigenous “representative institutions” as referred to in the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>81</sup> Moreover, I have always believed that the legitimacy of these Métis governments comes from their longevity and legitimacy in the eyes of the Métis people themselves, not from ultimately being recognized by other governments.

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80. It should be noted that many of these Métis governments were required by other governments to incorporate in the 1960s in order to access public government funding. Other governments required these governments to have legal status and capacity in Canadian law through some means. It is ironic that these incorporations are now used against them by some public governments to diminish their legitimacy as Métis governments. In Alberta, the Alberta Métis incorporated an “association” under Alberta’s *Societies Act*. In Manitoba, the Manitoba Métis incorporated the Manitoba Metis Federation Inc. In Saskatchewan, a society—the Métis Society of Saskatchewan—was created. In Ontario, the MNO incorporated a not-for-profit secretariat under Ontario’s *Corporations Act*.

81. GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295, arts 19, 32 [UNDRIP]. Notably, in each of MGRSAs noted above, Canada, through negotiations between the Métis and the executive branch the federal government, recognized the “inherent right of selfgovernment that is protected by sections 25 and 35 of the Constitution Act, 1982” of the “Métis Communities Represented by the MNO,” the “Métis people of Saskatchewan,” and the “Métis Nation with Alberta” respectively. See MGRSA, *supra* note 15 at 6; *Métis Government Recognition and Self-Government Agreement between the Métis Nation of Ontario and Canada*, 27 June 2019 at 7, online (pdf): <[www.metisnation.org/media/655331/2019-06-27-metis-government-recognition-and-self-government-agreement.pdf](http://www.metisnation.org/media/655331/2019-06-27-metis-government-recognition-and-self-government-agreement.pdf)> [perma.cc/5XGL-D8Y3]; *Métis Government Recognition and Self-Government Agreement between the Métis Nation-Saskatchewan and Canada*, 27 June 2019 at 6, online (pdf): <[www.metisnationsk.com/wp-content/uploads/2019/06/M%C3%A9tis-Government-Recognition-and-Self-Government-Agreement.pdf](http://www.metisnationsk.com/wp-content/uploads/2019/06/M%C3%A9tis-Government-Recognition-and-Self-Government-Agreement.pdf)> [perma.cc/WA4U-VBFZ].



Over generations, these Métis governments have evolved—and continue to evolve—with democratic structures at the local (*e.g.*, Locals), regional (*e.g.*, Regional Councils, including regionally elected leadership), and provincial (*e.g.*, a Provincial Council or Cabinet with provincially elected Presidents) levels, as well as at annual assemblies that allow all citizens to come together and receive updates on the activities of the government and engage directly in decision-making. Today, these Métis governments include unique and adaptive combinations of: historical aspects of Métis self-government (*e.g.*, the use of assemblies for decision-making on significant issues, where each local community is represented through Locals similar to the historic parishes in the Red River area, et cetera); the use of union-style forms of organization; corporate structures; and some aspects of a Westminster model of government. Are they perfect? Absolutely not. But show me any government—Indigenous or non-Indigenous—that is. Most importantly, however, over the generations, these Métis governments have kept the goal of self-government and Métis rights alive. On this front, they have served the Métis well. Moreover, as all governments should, they continue to adapt to the needs of the citizens and the times.

From a Métis perspective, the corporate legal realities of these Métis governments do not diminish their legitimacy any more than First Nation governments are diminished because they have had the *Indian Act* and the Band council system imposed on them by federal legislation. Many of the legal recognition challenges Indigenous peoples and their governments face today flow from a legacy of colonization, denial, and neglect. They are not of their own making and it is a constant struggle for Indigenous governments to maneuver through colonial laws and systems, government policies, and the courts in order to be finally recognized as Indigenous governments on a nation-to-nation, government-to-government basis with the Crown as well as within Canada's legal system.

## 2. BACKGROUND ON THE *FORT CHIPEWYAN* CASE

The MNA is the result of over ninety years of Métis political organization and selfgovernment in Alberta. Today, it has over forty-six thousand registered Métis citizens, administers millions of dollars in programs and services annually to Alberta Métis,<sup>82</sup> owns hundreds of buildings and homes throughout Alberta<sup>83</sup>

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82. Including through, for example, Apeetogosan (Métis) Development Inc, Rupertsland Institute, and Rupertsland Center for Métis Research.

83. Including through MNA's affiliates, Métis Urban Housing Corporation and Métis Capital Housing Corporation.

including a Métis interpretative centre called Métis Crossing, and has signed agreements with Canada on Métis access to federal parks, Crown consultation, and self-government.<sup>84</sup> For the most part, the MNA has had a progressive and positive relationship with Alberta (although there have been peaks and valleys), which has been formalized through several framework agreements since the 1990s with the most recent being signed in 2017 for a ten-year period.<sup>85</sup>

As set out in the MNA bylaws, all MNA citizens voluntarily authorize the MNA to advance their collectively-held Métis rights, interests, and claims.<sup>86</sup> Consistent with a typical Métis governance structure discussed above, the MNA bylaws establish three levels of government which include:

1. Local Councils (Locals) that include a President, Vice-President, Secretary, and Treasurer who are elected by members of the Local;<sup>87</sup>
2. Regional Councils that include regionally elected Métis leadership (who also sit on the Provincial Council) as well as the Locals from within each of the MNA's six Regions;<sup>88</sup> and
3. A Provincial Council that includes regionally and provincially elected leadership who are elected by MNA members every four years through province-wide ballot box elections.<sup>89</sup>

While Canada has signed an agreement with the MNA on federal Crown consultation, provincial Crown consultation remains elusive. Alberta has established provincial policies for Crown consultation with First Nations and the

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84. *Memorandum of Understanding between Parks Canada and MNA respecting Indigenous Peoples Open Doors Program*, 31 July 2018, online (pdf): <[www.albertametisgov.com/wp-content/uploads/2018/08/Parks-Canada-MNA-Open-Doors-Program\\_MOU\\_31July18.pdf](http://www.albertametisgov.com/wp-content/uploads/2018/08/Parks-Canada-MNA-Open-Doors-Program_MOU_31July18.pdf)> [perma.cc/4EMU-ZGKZ]; *Consultation Agreement between the MNA and Canada*, 19 July 2018, online (pdf): <[www.albertametisgov.com/wp-content/uploads/2020/02/MNA\\_Canada-Consultation-Agreement-July-2019.pdf](http://www.albertametisgov.com/wp-content/uploads/2020/02/MNA_Canada-Consultation-Agreement-July-2019.pdf)> [perma.cc/4274-CH9K]; MGRSA, *supra* note 15.

85. See *Framework Agreement between Alberta and MNA*, 1 February 2017, online (pdf): <[open.alberta.ca/dataset/eac3e6c9-e54f-4d4c-81f7-a47b8e39d7e9/resource/de6ebd40-9bbb-41ea-8ec2-fa4f06ebf607/download/mna-framework-agreement-jan-31-2017.pdf](http://open.alberta.ca/dataset/eac3e6c9-e54f-4d4c-81f7-a47b8e39d7e9/resource/de6ebd40-9bbb-41ea-8ec2-fa4f06ebf607/download/mna-framework-agreement-jan-31-2017.pdf)> [perma.cc/6D7Y-9FTV] (as well as predecessor agreements).

86. Bylaws of the MNA (updated 17 September 2019), Schedule A at 73, online (pdf): <[albertametis.com/wp-content/uploads/2020/06/Metis-Nation-of-Alberta-Bylaws-Consolidated-Updated-September-17-2019.pdf](http://albertametis.com/wp-content/uploads/2020/06/Metis-Nation-of-Alberta-Bylaws-Consolidated-Updated-September-17-2019.pdf)> [perma.cc/UE9C-J7KV] [MNA Bylaws]. Courts in Alberta have also considered and confirmed this authorization. See *McCargar v Métis Nation of Alberta Association*, 2018 ABQB 553, aff'd 2019 ABCA 172.

87. MNA Bylaws, *supra* note 86, art 12.4.

88. *Ibid*, art 12.3.

89. *Ibid*, art 12.2.

eight Alberta Métis Settlements,<sup>90</sup> and yet off-Settlement Métis consultation does not occur and no comparable provincial policy exists.

Despite this gap in relation to Crown–Métis consultation, Alberta has had a provincial Métis harvesting policy since 2007. This policy recognized “the eight Métis Settlements and... 17 [other] communities as both historic and contemporary Métis communities” for the purpose of Métis harvesting.<sup>91</sup> The MNA objected to the 2007 Harvesting Policy because it employed the technique discussed above of identifying “dots on a map” and then drawing arbitrary 160 kilometre circles around those dots to identify Métis communities and their harvesting areas. This policy also involved Métis individuals applying to Alberta to be recognized as a “Métis harvester” under the policy, without any role for the MNA in identifying Métis harvesters.

Despite the MNA’s objections, the 2007 Harvesting Policy remained in place until it was updated with the MNA’s participation and support in September 2018 (with the new policy officially taking effect one year later in September 2019).<sup>92</sup> The 2018 Harvesting Policy recognizes four large regional Métis communities and harvesting areas throughout the province and also resulted in a harvesting agreement being executed between the MNA and Alberta in March 2019 that provides for the MNA to identify eligible Métis rights-holders and issue harvester stickers to its citizens under the policy.<sup>93</sup> Despite this collaborative work on section 35 Métis harvesting rights—and the accommodation of those rights through this revised harvesting policy—Alberta continues to refuse to

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90. *The Government of Alberta’s First Nations Consultation Policy on Land Management and Resource Development* (16 May 2005), online (pdf): <open.alberta.ca/dataset/1006f6ce-400c-4c5a-a21e-dcb511da66b4/resource/be9f23c6-cb3c-4abc-aeab-5f8f82106b1c/download/3118589-2005-first-nations-consultation-policy-on-land-management.pdf> [perma.cc/46UK-V5NV]; *The Government of Alberta’s policy on consultation with Metis settlements on land and natural resource management, 2015* (amended 1 April 2020), online (pdf): <open.alberta.ca/dataset/a13ecaac-117c-4760-bcb9-f1c7d4dd8497/resource/767e1695-4299-4b08-a72b-e60aab1650d5/download/ir-policy-consultation-metis-settlements-land-resources-2015-amended-2020.pdf> [perma.cc/QE7D-ABS4].
  91. Alberta Environment and Parks, *Métis Harvesting in Alberta* (July 2007, updated June 2010), online (pdf): <open.alberta.ca/dataset/57bdd5ba-d024-4c06-b3aa-b9cbf8c513ca/resource/b0da0882-4ddc-4886-abc1-b6d3ab6f485e/download/metisharvestinginalberta-jun2010.pdf> [perma.cc/J5QU-UTXG] [2007 Métis Harvesting Policy].
  92. Alberta Environment and Parks, *Métis Harvesting in Alberta Policy (2018)* (updated 25 February 2019), online (pdf): <open.alberta.ca/dataset/7763cb9c-9457-439b-b206-f31d65156e9c/resource/d1c7a3d9-5a9d-4654-b745-cd4e7a64cedd/download/metis-harvesting-in-alberta-2018.pdf> [perma.cc/UD7Y-32V9] [2018 Métis Harvesting Policy].
  93. MNA–Alberta Harvesting Agreement, *supra* note 13.

consult with the MNA in any way on resource development occurring in the province. Inexplicably, sixteen years after *Haida*, Alberta still has not undertaken a single Crown consultation with the MNA, its Regional Councils, or its Locals.

The Fort Chipewyan Métis Nation of Alberta Local #125 (MNA Local #125) is an MNA Local Council and a part of the MNA's overall governance structure. Between 2007 and 2019, Fort Chipewyan was recognized as one of the seventeen Métis communities identified in Alberta's 2007 Harvesting Policy. MNA Local #125 brought forward the *Fort Chipewyan* litigation in its individual capacity. Neither the MNA, MNA Region 1 (the MNA Region where MNA Local #125 is located), or the MNA's legal counsel<sup>94</sup> actively participated in the litigation. Nor were the MNA's bylaws, membership registration system, or authorization from its members vis-à-vis Crown consultation directly at issue in this case.

This lack of collaboration and coordination between the MNA and MNA Local #125, as well as the gaps in the evidentiary record around membership and authorization that were readily apparent in *Fort Chipewyan* contributed to the court's conclusion that MNA Local #125 was not authorized to represent the Fort Chipewyan Métis community for the purposes of Crown consultation.<sup>95</sup> That being said, this article focuses not on whether those determinations were correct, but rather on a legal issue that emerged upstream. Specifically, given that Alberta had already recognized Fort Chipewyan as both a historic and contemporary Métis community for the purposes of Métis harvesting rights—and accommodated those harvesting rights in the 2007 Métis Harvesting Policy—the provincial Crown had a corresponding positive obligation to negotiate or, at the very least, attempt to work with the Métis to identify who does represent the Fort Chipewyan Métis community for the purposes of Crown consultation.

Clearly, the 2007 Métis Harvesting Policy was based on some actual or constructive knowledge of a Métis community and credibly asserted Métis harvesting rights in the Fort Chipewyan area. As the discussion above demonstrates, the Crown is not in the habit of proactively recognizing or accommodating Métis rights based on good will. If Alberta had enough knowledge to accommodate Métis harvesting rights in this area, could it then sit on its hands and deny that any Crown consultation flows from these accommodated Métis rights? Based on *Powley*, the case law discussed above, and the facts of this case, I argue it could not. Alberta had—and has—a corollary duty to negotiate with Métis on these issues, which *Fort Chipewyan* completely ignores.

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94. I, along with our firm, have been the MNA's long-standing legal counsel on Métis rights related issues, but played no active role in *Fort Chipewyan*.

95. *Fort Chipewyan*, *supra* note 19 at 422.

## B. OVERVIEW OF THE *FORT CHIPEWYAN* CASE

### 1. WHAT WAS THE CASE ABOUT?

*Fort Chipewyan* involved an application for judicial review filed by MNA Local #125 (referred to as the “Fort Chipewyan Métis Local” or “FCM Local” by the court) of Alberta’s decision made in 2015 that it did not owe MNA Local #125 any Crown consultation with respect to the Teck Frontier oil sands mine project. The Teck project was a proposed “truck-and-shovel” oil sands mine located about one hundred and ten kilometres north of Fort McMurray, in the Athabasca oil sands region of northeastern Alberta.<sup>96</sup>

As noted above, Alberta’s 2007 Métis Harvesting Policy identified Fort Chipewyan as both a historic and contemporary Métis community for the purposes of Métis harvesting rights. The Teck project’s study area overlapped with the 160 kilometre radius harvesting area of the Fort Chipewyan Métis community. As is required for a project of this nature, Teck submitted a draft Aboriginal Consultation Plan for the project to Alberta in 2008.<sup>97</sup> Teck’s proposed plan identified MNA Local #125 in a list of Aboriginal communities that Teck proposed to consult with to the fullest extent provided for in the plan. Alberta, through Alberta Environment and Parks, reviewed Teck’s plan and informed Teck that MNA Local #125 had no legally established rights.<sup>98</sup> In response, Teck revised its Aboriginal Consultation Plan to state that “although Métis consultation requirements have yet to be clarified by the Government of Alberta, Teck has included potentially affected Métis communities...as a matter of best practice.”<sup>99</sup>

MNA Local #125 was actively involved in the environmental assessment process for the Teck project. Under Alberta’s regulatory regime, it submitted a Statement of Concern asserting that Métis rights to hunt, fish, and gather would be adversely impacted by the Teck project, amongst other concerns. MNA Local #125 attempted repeatedly to meet with the Crown about these issues. On several occasions, Alberta requested information from the Local about its membership requirements, the geographic scope of the community that the Local purported to represent, and the historic Métis community (and communities) to which the Local’s members claimed ancestral connections, with a breakdown

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96. In February 2020, the Teck Project was ultimately shelved by the proponent for financial and regulatory reasons.

97. *Fort Chipewyan*, *supra* note 19 at paras 6-10.

98. *Ibid* at para 10.

99. *Ibid* at para 11.

of the membership's ties to those communities. MNA Local #125 made several submissions to the Crown in attempts to respond to these questions.<sup>100</sup>

After considerable correspondence back and forth between 2012 to 2015, MNA Local #125 received two letters from Alberta indicating that that it had insufficient information to determine "whether there is a credible assertion that FCM [Local] is a rights-bearing Métis community," therefore, the Crown's duty to consult was not triggered (the Decision).<sup>101</sup> In response, the Local brought an application for judicial review, challenging the Decision. Justice Goss of the Alberta Court of Queen's Bench heard the judicial review in May 2016 and rendered her decision and reasons for judgement in December 2016.

Importantly, the court was not asked to make determinations on the existence, scope, or infringement of any Métis rights in the region protected by section 35 of the *Constitution Act, 1982*. The case was only about whether a credible assertion of rights by MNA Local #125 had been made, sufficient to trigger Crown consultation obligations.<sup>102</sup> MNA Local #125 asked the court to do two things: first, declare that Alberta's decision was incorrect and breached the honour of the Crown; and second, order that Alberta be required to consult and accommodate the Local regarding the Teck Project prior to the Project being approved or constructed.

## 2. WHAT THE COURT HELD IN *FORT CHIPEWYAN*

The SCC's three-part legal test for triggering the Crown's duty to consult (known as the *Haida* test) requires that Aboriginal claimants establish the following: (1) the Crown has knowledge of an actual or asserted Aboriginal right; (2) the Crown contemplates conduct that has the potential to affect that right; and (3) the contemplated Crown conduct could adversely impact the actual or asserted right.<sup>103</sup>

In applying the *Haida* test in relation to "claims of unorganized Aboriginal collectives," in which the court included Métis communities who may not yet have their governance structures formally recognized by the Crown,<sup>104</sup> Justice Goss held she also needed to determine whether there was credible evidence on two additional threshold questions: (1) are MNA Local #125's members part of a rights-bearing Métis community (*i.e.*, do its members meet the requirements

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100. This history is summarized in *Fort Chipewyan*. *Ibid* at paras 5-70.

101. *Ibid* at paras 60, 69.

102. *Ibid* at para 109.

103. *Haida*, *supra* note 20 at para 35.

104. *Fort Chipewyan*, *supra* note 19 at para 396.

set out in *Powley*)? And (2) have the members of the rights-bearing Métis community authorized MNA Local #125 to represent it for the purposes of Crown consultation?<sup>105</sup>

In so doing, the court modified the *Haida* test for triggering the Crown's duty to consult Métis communities by adding these two additional requirements to the first branch of the *Haida* test. According to the court's reformulated version of the first branch, a Métis claimant must establish the Crown has knowledge of an actual or asserted right of a Métis community, and this requires credible evidence that a rights-bearing Métis community can be established based on the *Powley* test. And so the first, newly added requirement asks whether there is credible evidence that the members of the organization asserting the right meet the provisions of the *Powley* test (*i.e.*, they must self-identify as Métis, they must have an ancestral connection to the historic Métis community that grounds the rights assertion, and they must be accepted by the community). The second, newly added requirement asks whether there is credible evidence that these Métis rights-holders authorized the organization for the purposes of Crown consultation.<sup>106</sup>

In order to justify the need for these additional requirements in the Métis context, the court repeatedly relied on the following proposition from the Alberta Court of Appeal:<sup>107</sup>

... [t]here is nothing ironic or improper about jealously guarding entrenched constitutional rights, and ensuring that only those truly entitled are allowed to assert those rights. Those who do enjoy such rights are entitled to expect that their rights will not be watered down by the recognition of unentitled claimants.

#### I. THE COURT FOUND THE FORT CHIPEWYAN MÉTIS HAD A *PRIMA FACIE* HARVESTING RIGHT CLAIM

Based on the “sparse and somewhat vague”<sup>108</sup> record put forward by MNA Local #125, the court found that “the existence of an identifiable Métis community with a distinctive collective identity, living together in the same geographic area and sharing a common way of life, has not been demonstrated with a sufficient degree of continuity and stability to support a site-specific Aboriginal right.”<sup>109</sup>

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105. *Ibid* at paras 341, 391.

106. *Ibid*.

107. *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12 at para 39 [*L'Hirondelle*].

108. *Fort Chipewyan*, *supra* note 19 at para 354.

109. *Ibid*.

After reaching this conclusion based on evidence put forward by MNA Local #125, however, the court went on to consider the significance of the 2007 Métis Harvesting Policy.

In assessing the implications of Alberta's policy, the court acknowledged that the duty to consult is triggered at a "low, even very low"<sup>110</sup> threshold based on the SCC's jurisprudence that recognizes even "[t]enuous claims, for which a strong *prima facie* case is absent" are sufficient to trigger the duty.<sup>111</sup> Alberta submitted that its 2007 Harvesting Policy "does not contain a formal recognition of the listed communities [but rather] expressly states that the communities will be considered for the purposes of Métis harvesting [and] does not relate to consultation with Métis."<sup>112</sup> Despite this submission, the court held it would "assume that Alberta's Métis Harvesting Policy does provide some evidence to establish on a *prima facie* basis that the Fort Chipewyan Métis Community is a rights-bearing community within a 160 km radius of Fort Chipewyan."<sup>113</sup>

This important (and, in my opinion, correct) determination by Justice Goss that the original first branch of the duty to consult test could be satisfied by the 2007 Harvesting Policy should have warranted at least a discussion by the court as to whether Alberta had demonstrated any efforts to work with the Métis in order to ascertain who should be consulted as the Métis rights-holder or an authorized representative of the rights-holder. It must be remembered that the duty to consult is *the Crown's* duty owing to rights-bearing Aboriginal communities. While Aboriginal rights and the associated Crown duties flowing from them should be "jealously guard[ed],"<sup>114</sup> there is a corollary duty to ascertain, or at least make some efforts to determine, who those constitutional rights-holders are. The role of government should not be to merely sit back and deny the existence of its duty. This turns the fact that it is *the Crown's* duty on its head, placing the full onus for implementing the duty (even after a credibly asserted right has been accommodated or established) on Aboriginal communities. This cannot be. Once the Crown or a court has recognized there is a credibly asserted right in a given area, the onus must shift, and the Crown must have at least some positive obligation to, at the very least, try to determine who needs to be consulted, if not engage in negotiations on these matters.

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110. *Ibid* at para 90.

111. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 40.

112. *Fort Chipewyan*, *supra* note 19 at para 272.

113. *Ibid* at para 365.

114. *L'Hirondelle*, *supra* note 107 at para 39.



Put another way, when a *prima facie* rights claim has been made out, there is a consequential duty that falls on the Crown to at least try to determine to whom the duty is owed. This duty cannot be orphaned or ignored by the Crown because governments have a legacy of not recognizing and respecting Métis governance structures such as the MNA. This inaction is particularly unacceptable when there are longstanding Métis governance structures, on-the-ground, that are asking for Crown consultation and willing to come to the table. A “sit on your hands” and “wait-and-see” approach, where the Crown unilaterally decides when and how to assess whether groups that come forward are the rights-holder or authorized representative, does not uphold the honour of the Crown or positive obligations that flow from the duty to consult. Moreover, this type of situation (*i.e.*, where the court has recognized a right by accommodating it, but there is no rights-holders the Crown recognizes) seems to be the exact type of situation where “a context-specific duty to negotiate when Aboriginal rights are engaged.”<sup>115</sup>

## II. THE COURT FOUND THE MNA LOCAL #125 WAS NOT AUTHORIZED TO REPRESENT THE FORT CHIPEWYAN MÉTIS COMMUNITY

The court then went on to consider the two additional requirements it added to the *Haida* test for Métis communities: whether MNA Local #125 represented the Fort Chipewyan Métis community. After considering the evidence provided by MNA Local #125 about its members and membership criteria, the court concluded that that it had not demonstrated that the Local’s members were members of a rights-bearing Métis community, however defined.<sup>116</sup> The court went on to also make the point it did not accept MNA Local #125’s attempts to describe itself as being interchangeable with the Fort Chipewyan Métis community.<sup>117</sup>

The conclusion that MNA Local #125 was not interchangeable with the Fort Chipewyan Métis community was not in itself fatal to the Local’s case. The court restated previous direction from the SCC that Aboriginal groups, including Métis communities, can authorize “organizations” to represent them for the purposes of asserting section 35 rights and engaging in Crown consultation.<sup>118</sup> The court, therefore, asked whether MNA Local #125 was so authorized and set out the test for this authorization as follows: “[T]he legal entity whose *source of authority* and *nature of its representation* are demonstrably determinable would have the

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115. *Daniels*, *supra* note 3 at para 56.

116. *Fort Chipewyan*, *supra* note 19 at paras 358-59.

117. *Ibid* at para 421.

118. *Ibid* at para 75.

appropriate legal standing to speak for the Fort Chipewyan Métis Community that is the Aboriginal collective right-bearer.”<sup>119</sup>

The court provided examples of other “Métis organizations” that had satisfied this test in other litigation,<sup>120</sup> but concluded it was unable to come to a similar conclusion with respect to MNA Local #125 based on the record before it.<sup>121</sup> The court suggested that one way MNA Local #125 could have shown that it was properly authorized to conduct consultations would have been for such authorization to be explicit in its bylaws.<sup>122</sup> In this case, however, MNA Local #125’s bylaws were not even included in the evidence (nor were the MNA bylaws).<sup>123</sup> In order to further bolster its conclusion that MNA Local #125 was not properly authorized by the Fort Chipewyan Métis community, the court also noted the apparent gap between the actual membership of the Local and the estimated population of the rights-bearing Métis community (a population estimate that MNA Local #125 itself provided).<sup>124</sup>

The court then went on to consider arguments made by Alberta as to why it should not have to consult with *any Métis whatsoever* when there are potential competing claims and the possibility of inefficient consultation efforts. In particular, allegations of potential disagreements between the MNA, its Regional Councils and Locals, which were not directly before the court in this case, were relied upon to come to the following conclusion:<sup>125</sup>

In a situation where the MNA, MNA Region 1, and the FCM Local purport to represent the Aboriginal rights holding Métis of Fort Chipewyan with respect to consultation, it is obvious that ascertaining who speaks for the Métis in asserting Aboriginal rights and seeking Crown consultation becomes a critical issue to be resolved. As such, this Court agrees with the Alberta Crown’s submission that it would amount to a waste of resources for the Alberta Crown to potentially have to consult with several separate organizations who state that they represent smaller

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119. *Ibid* at para 397.

120. *Ibid* at paras 374-75.

121. *Ibid* at paras 421-23.

122. *Ibid* at para 422.

123. For a discussion of the jurisprudence pertaining to the authorization required to represent a rights-bearing Aboriginal people, see Drake, *supra* note 50 at 10-15.

124. *Fort Chipewyan*, *supra* note 19 at para 411. In my opinion, the use of these census numbers in this way is problematic as they often rely on self-identification alone and fail to accurately capture or identify only those individuals who would meet the test set out in *Powley* for identifying Métis section 35 rights-holders, which in addition to self-identification as Métis requires, among other things, factors such as acceptance by a modern-day Métis community and connection to a historic Métis community.

125. *Ibid* at para 408.

or larger subsets of the same group in respect of the same interests and the same project. It is efficient and justifiable for the Alberta Crown to seek some assurance that it is consulting with the authorized representative of an Aboriginal collective.

With respect, this conclusion is simply wrong based on *Powley*, the duty to negotiate, and *Haida*. Essentially, the court concludes that potentially conflicting Métis representation claims (even though none were before the court in this case) may be used as a justification by Crown governments to deny Crown consultation with any Métis. The perverse nature of the court's logic is especially striking when one considers that the Crown's own inaction and reluctance to recognize Métis governance structures over the generations contributes to any conflicting claims. This is the very definition of a government sitting on its hands and relying on its own inaction to deny a duty flowing from a constitutionally protected Métis right. As discussed above, the SCC in *Powley* slayed this rights-denial dragon nearly two decades ago when it held that "the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada."<sup>126</sup> Similarly, the Ontario Court of Appeal in *Powley* held that, "[t]he government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the [Métis] right is uncertain."<sup>127</sup> And yet, this Métis rights-denial dragon rises again, but in an even more absurd form because there is no even a blanket denial of the right based on the 2007 Harvesting Policy. Ultimately, the court concluded that MNA Local #125 was not authorized to represent the Fort Chipewyan Métis community.

The court also held the duty to consult was not triggered because the third branch of the *Haida* test was not satisfied. According to the court, the record did not disclose "how the Project would potentially impact the collective Aboriginal rights asserted by the entire Fort Chipewyan Métis Community."<sup>128</sup> Thus, the court dismissed the Local's judicial review application in its entirety.<sup>129</sup>

### C. IMPLICATIONS OF THE FORT CHIPEWYAN CASE

Since its release at the end of 2016, *Fort Chipewyan* has, naturally, been embraced by Alberta and derided by the Métis. The case has bolstered Alberta's astonishing record of not engaging in a single consultation for over sixteen years with the

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126. *Powley*, *supra* note 1 at para 49.

127. *Powley* (2001), *supra* note 40.

128. *Fort Chipewyan*, *supra* note 19 at para 451.

129. *Ibid* at paras 476-77.

MNA, who is the federally recognized representative of the Métis Nation within Alberta and whom Canada consults with.<sup>130</sup>

*Fort Chipewyan* has also informed the development of Alberta's Métis Credible Assertion Policy, which was publicly released in December 2019.<sup>131</sup> This new policy encourages "Métis organizations" to apply to Alberta, which will then assess whether it will recognize the organization as representative of a rights-bearing Métis community. The policy rests on the incorrect legal assumption, validated by the court in *Fort Chipewyan*, that applicants are required to prove to Alberta that they are representative of a rights-bearing Métis community prior to Alberta being required to engage in any consultation, as opposed to Alberta having any positive obligation or role to figure out who represents Métis whose harvesting rights have already been acknowledged and accommodated through provincial harvesting policies.

In September 2019, Alberta cancelled all discussions with the MNA with respect to developing a Métis Consultation Policy and now solely relies on its Métis Credible Assertion Policy to address off-Settlement Métis consultation issues in the province. This cancellation came after the MNA had signed a harvesting agreement with Alberta in March 2019 that implements Alberta's new 2019 Métis Harvesting Policy (developed in collaboration with the MNA and that, as outlined above, recognizes the MNA's ability to issue Métis Harvester Identification Stickers to its eligible citizens and thus to have a role in implementing the policy). The inexplicable result is as follows: Métis harvesting rights are accommodated at a regional level throughout most of the province; the MNA is authorized to represent the vast number of eligible Métis harvesters for the purposes of Crown consultation based on its bylaws and has a verified Métis registry identifying these Métis harvesters; yet, Alberta continues to refuse to consult with the MNA, its Regional Councils, or its Locals.

In response, in March 2020, the MNA filed an application seeking judicial review of Alberta's decision to cancel negotiations with it about developing a Métis Consultation Policy based on a breach of the honour of the Crown, including the duty to negotiate.<sup>132</sup>

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130. MGRSA, *supra* note 15.

131. "Métis Credible Assertion: Process and Criteria" (13 December 2019), online (pdf): *Government of Alberta* <[open.alberta.ca/dataset/e74ec17c-9cf6-4f2c-8dde-1cae21ae6b0c/resource/19a86947-5798-46e3-a150-a436ccfb2f6a/download/ir-metis-credible-assertion.pdf](https://open.alberta.ca/dataset/e74ec17c-9cf6-4f2c-8dde-1cae21ae6b0c/resource/19a86947-5798-46e3-a150-a436ccfb2f6a/download/ir-metis-credible-assertion.pdf)> [perma.cc/E37H-NHV9].

132. *MNA v Alberta (Minister of Indigenous Relations and Minister of Justice and Solicitor General)* (5 March 2020), Edmonton, Alta QB 2003-04935 (originating application for judicial review). A hearing of this application is currently scheduled for June 2021.

Fortunately, at the time of writing this article, the re-emergence of this Métis rights-denial dragon seems to be limited to Alberta. In other provinces, where Métis harvesting rights have been established, recognized, or accommodated through negotiated agreements with the Crown, provincial governments at least attempt to, or do, consult with the Métis governments who are signatories to those agreements. With that said, dragons know how to fly and the purpose of this article is to outline why this dragon, in mutated form, cannot spread and will hopefully be slayed—again—in future litigation on Métis consultation.

### III. CONCLUSION

In *Powley*, the SCC slayed the most duplicitous of the Métis rights-denial dragons that uncertainty in the relation to the identification of Métis rights-holders or competing Métis representative claims could be used as a justification to deny Métis section 35 rights. This dragon had resulted in wholesale denial of all Métis rights for generations, and could not be sustained if section 35 was to have any meaning for the Métis. The SCC confirmed that when credibly asserted or established rights claims were engaged, the Crown was burdened with positive obligations to negotiate. Seventeen years later, several agreements on Métis harvesting rights demonstrate this was not an impossible task.

Increasingly in modern Canadian Aboriginal law, however, the search for the “proper rights-holder” is becoming a way to potentially limit or completely deny Aboriginal rights protected by section 35. In effect, constitutionally protected Aboriginal rights in section 35 (proven and unproven) have the potential to be hollow if there is no rights-holder who can access these rights. The *Fort Chipewyan* case is an example of how a previously slayed Métis rights-denial dragon has re-emerged in a legally unsound way in the context of Crown–Métis consultation. Indigenous peoples as well as the courts must be vigilant to ensure that the Crown’s positive duties flowing from section 35 are met. This will require collaborative efforts and solutions to ensure that rights-holders are identified and that this rights-denial dragon does not become a way to delay or deny the recognition of Métis rights.